(4) The beneficiary's bank is liable

(a) to the beneficiary for its improper execution or its failure to execute a payment order it has accepted to the extent provided by the law governing the [account relationship] [relationship between the beneficiary and the bank], and

(b) to its sender and to the originator for any losses caused by the bank's failure to place the funds at the disposal of the beneficiary in accordance with the terms of a pay date, execution date or value date stated in the order, as provided in article 7.

(5) If a bank is liable under this article to the originator or to its sender, it is obliged to compensate for

(a) loss of interest,

(b) loss caused by a change in exchange rates,

(c) expenses incurred for a new payment order and for reasonable costs of legal representation,

(d) any other loss that may have occurred as a result, if the improper [or late] execution or failure to execute resulted from an act or omission of the bank done with the intent to cause such improper [or late] execution or failure to execute, or recklessly and with knowledge that such improper [or late] execution or failure to execute would probably result.

(6) Banks may vary the provisions of this article by agreement to the extent that it increases or reduces the liability of the receiving bank to another bank and to the extent that the act or omission would not be described by paragraph (5)*(d)*. A bank may agree to increase its liability to an originator that is not a bank but may not reduce its liability to such an originator.

(7) The remedies provided in this article do not depend upon the existence of a pre-existing relationship between the parties, whether contractual or otherwise. These remedies shall be exclusive and no other remedy arising out of other doctrines of law shall be available.

Article 10. *Exemption from liability*

A receiving bank and any bank to which the receiving bank is directly or indirectly liable under article 9 is exempt from liability for a failure to perform any of its obligations if the bank proves that the failure was due to the order of a court or to interruption of communication facilities or equipment failure, suspension of payments by another bank, war, emergency conditions or other circumstances that the bank could not reasonably be expected to have taken into account at the time of the funds transfer or if the bank proves that it could not reasonably have avoided the event or overcome it or its consequences.

CHAPTER IV. CIVIL CONSEQUENCES OF FUNDS TRANSFER

Article 11. *Payment and discharge of monetary obligations; obligation of bank to account holder*

(1) Unless otherwise agreed by the parties, payment of a monetary obligation may be made by a credit transfer to an account of the beneficiary in a bank.

(2) The obligation of the debtor is discharged and the beneficiary's bank is indebted to the beneficiary to the extent of the payment order received by the beneficiary's bank when the payment order is accepted by the beneficiary's bank.

(3) If one or more intermediary banks have deducted charges from the amount of the credit transfer, the obligation is discharged by the amount of those charges in addition to the amount of the payment order as received by the beneficiary's bank. Unless otherwise agreed, the debtor is bound to compensate the creditor for the amount of those charges.

(4) To the extent that a receiving bank has a right of reimbursement from a sender by debit to an account held by the receiving bank for the sender, the account shall be deemed to be debited when the receiving bank accepts the payment order.

CHAPTER V. CONFLICT OF LAWS

Article 12. *Conflict of laws*

(1) Persons who anticipate that they will send and receive payment orders may agree that the law of the State of the sender, of the receiver or of the State in whose currency the payment orders are denominated will govern their mutual rights and obligations arising out of the payment orders. In the absence of agreement, the law of the State of the receiving bank will govern the rights and obligations arising out of the payment order.

(2) In the absence of agreement to the contrary, the law of the State where an obligation is to be discharged governs the mutual rights and obligations of an originator and beneficiary of a credit transfer. If between the parties an obligation could be discharged by credit transfer to an account in any of one or more States or if the transfer was not for the purpose of discharging an obligation, the law of the State where the beneficiary's bank is located governs the mutual rights and obligations of the originator and the beneficiary.

D. Draft model rules on electronic funds transfers: report of the Secretary-General[a] (A/CN.9/WG.IV/WP.39) [Original: English]

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INTRODUCTION

1. In conjunction with its decision at the nineteenth session in 1986 to authorize the Secretariat to publish the UNCITRAL Legal Guide on Electronic Funds Transfers as a product of the work of the Secretariat, the Commission decided to begin the preparation of Model Rules on electronic funds transfers and to entrust the task to the Working Group on International Payments (A/41/17, para. 230).

2. The Working Group undertook the task at its sixteenth session held at Vienna from 2 to 13 November 1987. At that session the Working Group reviewed a number of legal issues set forth in a report prepared by the Secretariat (A/CN.9/WG.IV/WP.35). At the conclusion of the session the Working Group requested the Secretariat to prepare draft provisions based on the discussions during that session for its consideration at its next meeting (A/CN.9/297, para. 98).

3. At its seventeenth session held at New York from 5 to 15 July 1988 the Working Group considered a text of draft provisions for Model Rules on Electronic Funds Transfers that had been prepared by the Secretariat (A/CN.9/WG.IV/WP.37). At the close of the session the Working Group requested the Secretariat to prepare a revised draft of the provisions for the Model Rules (A/CN.9/317, para. 10).

4. This report contains revised provisions as requested by the Working Group. When reference is made to a prior version of an article, it is the version found in A/CN.9/WG.IV/WP.37 and in the report of the seventeenth session of the Working Group, A/CN.9/317.

DRAFT PROVISIONS FOR MODEL RULES ON CREDIT TRANSFERS

Comment

1. The prior draft of the Model Rules was entitled "Model Rules on Electronic Funds Transfers", as is the title of this report. However, it was suggested by the Working Group at its seventeenth session that, in accordance with the decision taken by it that the Model Rules should apply to payment orders irrespective of the form in which they were made and the means by which they were transmitted from the sender to the receiving bank, consideration might be given to deleting the word "electronic" from the title of the Model Rules (A/CN.9/317, paras. 51 and 52).

2. The title that would result from a simple deletion of the word "electronic", i.e. "Model Rules on Funds Transfers", also does not seem appropriate, since such a title would encompass debit transfers in general, which the Working Group decided not to include for the time being (A/CN.9/317, para. 17), and funds transfers by means of bills of exchange and cheques, which the Working Group agreed at its sixteenth session should be completely excluded from the Model Rules (A/CN.9/297, para. 16). Therefore, it might be thought appropriate to make a direct reference to credit transfers in the title to the Model Rules.

3. At its seventeenth session the Working Group decided to proceed under the working assumption that the outcome of the work would be model legislation (A/CN.9/317, para. 25). Subject to a later decision as to the exact nature of the model legislation, i.e. convention, uniform law or model law, it may be thought that the words "Model Rules" remain appropriate.

4. Consequently, subject to any later decision on scope of application, it may be thought that the title that most adequately expresses the nature of the Model Rules is "Model Rules on Credit Transfers".

Chapter I. General Provisions

Article 1. *Sphere of application*

(1) These rules apply to credit transfers [where the originator's bank and the beneficiary's bank are in different countries or where the originator's bank and the beneficiary's bank are in the same country, but the currency in which the funds transfer is denominated is not the currency of that country].

(2) A State may adopt supplementary legislation dealing with the rights and obligations of [consumers] [originators and beneficiaries].

Comments

1. Since the Working Group agreed that the Model Rules should not, at least for the time being, deal with debit transfers (A/CN.9/317, para. 17), article 1 has been redrafted to indicate that it applies only to credit transfers as defined in article 2*(a)*. The definition of "payment order" in article 2*(i)* has also been modified to make it clear that it covers only credit transfers.

2. At its seventeenth session the Working Group decided to proceed under the assumption that the Model Rules would cover the domestic segments of international credit transfers (A/CN.9/317, para. 21). It left open the question whether purely domestic credit transfers would be covered. All credit transfers would be covered by the Model Rules if the words in brackets were deleted. Only international credit transfers would be covered if the words in brackets were retained. However, domestic as well as international segments of those transfers would be covered.

3. The test of internationality is based fundamentally on whether the originator's bank and the beneficiary's bank are located in different countries. The credit transfer is international even if the originator and the beneficiary are located in the same country and even if the originator and the beneficiary are the same person.

4. There are, however, credit transfers that should be considered to be international even though both the originator's bank and the beneficiary's bank are from the same country. Such credit transfers normally have two characteristics: they are denominated in a currency other than the currency of the country in which the two banks are located and, as a result, one or more intermediary banks in the credit transfer chain are located outside the country where the originator's bank and the beneficiary's bank are located.

5. Nevertheless, it should be noted that in some countries and for some foreign currencies or units of account as described in article 2*(h)* the originator's bank and the beneficiary's bank may settle directly between themselves or through a domestic settlement system without having to pass through a foreign intermediary bank.

6. Paragraph (2) was added at the suggestion of the Working Group (A/CN.9/317, para. 23). An explicit statement such as this is necessary within the text of the Model Rules only if they take the form of a convention.

Article 2. *Definitions*

(a) "Credit transfer" means a complete movement of funds from the originator to the beneficiary. A credit transfer may consist of one or more segments.

(b) "Originator" means the issuer of the first payment order in a credit transfer.

(c) "Beneficiary" means the ultimate party to be credited or paid as a result of a credit transfer.

(d) "Sender" means the party who sends a payment order [including the originator and any sending bank].

(e) "Bank" means a financial institution which, as an ordinary part of its business, engages in credit transfers for other parties. For the purposes of these Rules a branch of a bank is considered to be a separate bank.

(f) "Receiving bank" means the bank to which a payment order is delivered.

(g) "Intermediary Bank" means any bank executing a payment order other than the originator's bank and the beneficiary's bank.

(h) "Funds" or "money" includes credit in an account kept by a bank. The credit may be denominated in any national currency or in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States, provided that these Rules shall apply without prejudice to the rules of the intergovernmental institution or the stipulations of the agreement.

(i) "Payment order" means a message, whether written or oral, that contains either explicitly or implicitly at least the following data:

- (i) an order to the receiving bank to pay, or to cause another bank to pay, to a designated person a fixed or determinable amount of money;
- (ii) identification of the sender;
- (iii) identification of the receiving bank;
- (iv) the amount of the transfer, including the currency or the unit of account;
- (v) identification of the beneficiary;
- (vi) identification of the beneficiary's bank.

(j) "Authentication" means a technique used between the sender and receiver to validate the source of a message.

(k) "Cover" means the provision of funds to a bank to reimburse it for a payment order sent to it. The provision of cover might precede or follow execution of the order by the receiving bank.

(l) "Execution date" means the date when the receiving bank is to execute the payment order, as specified by the sender.

(m) "Pay date" means the date when funds are to be at the disposal of the beneficiary, as specified by the originator.

(n) "Value date" means the date when funds are to be at the disposal of the receiving bank.

Comments

Credit Transfer

1. The Working Group requested that the full definition of "funds transfer" from ISO 7982-1 be used (A/CN.9/317, para. 38) That definition has been adapted to the term "credit transfer" so as to make it somewhat clearer that the funds flow is from the originator to the beneficiary, which is the nature of a credit transfer, and not merely between them, which could encompass a flow of funds in either direction.

2. At its seventeenth session the Working Group requested that the Model Rules be more specific in pointing out that the credit transfer might be composed of segments (A/CN.9/317, paras. 24 and 38). Moreover, the Working Group decided to delete the term "funds transfer transaction" because it was not satisfied with either the term or with its definition (A/CN.9/317, para. 40). As a result the word "segment" has been used instead. The word is not defined, both because in context its meaning is clear and because any attempted definition would encounter difficult conceptual problems.

Originator, beneficiary

3. The definitions of "originator" and "beneficiary" were approved by the Working Group at its seventeenth session (A/CN.9/317, paras. 32 and 42). "Beneficiary" is the same as in ISO 7982-1 while "originator" differs from it in wording but not in intended meaning. The originator or beneficiary of a credit transfer may be a bank or it may be a non-bank customer of a bank.

Sender

4. Although it was suggested in the Working Group that the term "sender" should not cover the originator (A/CN.9/317, para. 46), the definition has been left unchanged. Since both the originator and banks send payment orders, it would seem that their rights and obligations in this capacity should be the same, unless specifically provided otherwise (see article 4(3)). This is accomplished in part by including both in the definition of sender.

Bank

5. Although the Working Group requested that consideration be given to the use of an alternative to the word "bank", no other suitable word has been found that met the criteria for the definition agreed upon by the Working Group (A/CN.9/317, paras. 29 and 41).

6. As suggested in the Working Group, the definition has been narrowed to include only those financial institutions that engage in transfers for other parties (A/CN.9/317, para. 31). As noted in the Working Group, this leaves open several questions as to when a bank engages in transfers for other parties. However, under the current definition, once a financial institution meets the definition of being a bank, transfers that it effectuates for itself would also be covered by the Model Rules.

7. As decided by the Working Group at its seventeenth session, for the purposes of the Model Rules, a branch of a bank is considered to be a separate bank (A/CN.9/317, para. 97).

Receiving Bank

8. Under this definition, which has been retained unchanged, the receiving bank becomes responsible for a payment order only when that payment order has been delivered to it. The observation was made in the Working Group that if the word "delivered" was used, the definition might not cover the situation where the payment order was sent but not delivered (A/CN.9/317, para. 45). However, until the payment order has been delivered, the sender has not effectuated the communication.

Intermediary Bank

9. The definition was proposed by the Working Group at its seventeenth session (A/CN.9/317, para. 41). It differs from the definition in ISO 7982-1 in three substantial respects: first, it includes all banks other than the originator's bank and the beneficiary's bank, whereas ISO 7982-1 includes only those banks between the given receiving bank and the beneficiary's bank; secondly, ISO 7982-1 includes only those banks between the receiving bank and the beneficiary's bank "through which the transfer must pass if specified by the sending bank"; and thirdly, reimbursing banks are included in this definition, even though the transfer may be considered not to pass through them and they are not in the flow of the payment order.

Funds, money

10. This definition, taken from the draft Convention on International Bills of Exchange and International Promissory Notes, article 6(l), contains the phrase "any national currency" rather than the previous "a national currency", so as to meet the suggestion at the seventeenth session of the Working Group that it be made clear that the credit might be in a currency other than the national currency of the State in which the account was kept (A/CN.9/317, para. 37). It may be questioned whether this change is necessary or whether it may not be possible to revert to the prior text so as to be consistent with the draft convention. Neither this definition nor the inclusion of the currency of the credit transfer as one of the necessary data elements affects any national rules that might restrict the freedom of the parties to determine the currency of the credit transfer (A/CN.9/317, para. 61).

Payment order

11. In accordance with a suggestion made in the Working Group, the minimum data elements necessary to

constitute a payment order have been included in the definition of the term (A/CN.9/317, para. 54). Inclusion of these data elements in the Model Rules will have an educational function. Other data elements may be required by a particular funds transfer system (see comment 15). The sender's failure to include one of the necessary data elements will be a factor in allocating loss in case the transfer is not carried out, is carried out late or is carried out incorrectly. Such failure does not, however, affect the scope of application of the Model Rules.

12. Authentication has been deleted as a required data element in a payment order. It is, however, defined in subparagraph *(j)*. In accordance with the suggestion in the Working Group the consequences of a failure to authenticate a payment order or other message are considered in article 4 on the obligations of a sender (A/CN.9/317, para. 55). The words "an instruction" have been changed to "a message", which brings the definition into accord with the definition of "authentication". The definition has also been made to accord to the other suggestions made in the Working Group (A/CN.9/317, para. 44).

13. Although there was some hesitancy in the Working Group as to whether it was necessary to specify that the payment order could be either written or oral (A/CN.9/317, para. 53), the words have been retained since they seem to add clarity to the definition.

14. The fact that the required data elements could be contained in the payment order "either explicitly or implicitly" would also seem to make it clear that communicating parties can agree on specific formats, as was suggested in the Working Group (A/CN.9/317, para. 53). The further suggestion that the parties should be bound by any such agreement is contained in article 4(3).

15. A preliminary version of ISO Draft Proposal 7982-2, "Universal Set of Data Segments and Elements for Electronic Funds Transfer Messages" contained in document ISO/TC68/SC5/N230, dated 8 August 1988, proposes a set of mandatory data elements. Under the proposal those mandatory data elements that would always be required to appear in the message are labeled Mandatory Explicit. The data elements that would be required either to appear in the message or be derivable from another mandatory data segment and/or data element in the message or from the processing conventions of the system used are referred to in the proposal as Mandatory Implicit. The document lists several data elements as being either mandatory explicit or mandatory implicit that are not set forth in the current definition of payment order, e.g. the date and time the message was delivered to the receiver by a communications service.

Authentication

16. As requested by the Working Group at its seventeenth session, a definition of "authentication" is included (A/CN.9/317, para. 47). The definition makes it clear that it does not refer to formal authentication by notarial seal or the equivalent, as it might otherwise be understood in some legal systems. The definition differs from the definition of "message authentication" in ISO 7982-1 in one important respect. The important difference is that "authentication" as here defined does not include the aspect of validating "part or all of the text" of a payment order. This is appropriate, even though most electronic authentication techniques do both, since these Rules also apply to paper-based payment orders. Although the definition does not contain any standard as to what constitutes an acceptable authentication, such a standard is implied in article 4(2).

Cover

17. The definition has been further modified from that of "cover payment" in ISO 7982-1 on the suggestion of the Working Group in order to make it clear that the provision of cover might precede or follow execution of the order by the receiving bank (A/CN.9/317, para. 33). While the obligation of the sender under article 4(4) is only to reimburse the receiving bank after it has executed the order, failure to have received cover would be a major reason why a receiving bank might refuse to accept, and therefore to execute, the order. Morever, if that is the reason for its refusal to accept the order, under article 5(1) the receiving bank is not required to notify the sender of that failure. A further reference to cover is found in article 6 where receipt of reimbursement (paragraph (1)) or of notice of cover (paragraph (2)) may be an element in a passive acceptance of the payment order by the receiving bank.

Execution date

18. The definition has been modified as suggested in the Working Group to make it clear that the date in question is the date when the payment order is expected to be executed and not when the instruction is given (A/CN.9/317, para. 36).

Pay date, value date

19. The definition of "value date" is that used in ISO 7982-1. The words expressing the idea of availability of funds to the designated person in the definitions of pay date and value date have been made to conform, as suggested by the Working Group (A/CN.9/317, para. 43). The definitions leave open the question when and under what circumstances funds are at the disposal of the beneficiary or receiving bank, as the case may be.

Article 3. *Interpretation of data elements*

Alternative A

If a data element is represented by any combination of words, figures or codes and there is a discrepancy between them, the receiving bank may consider each form of representation to be equally valid, unless the bank knew or ought to have known of the discrepancy.

Alternative B

(1) If there is a discrepancy between the amount of the transfer expressed in words and the amount of the transfer expressed in figures, the amount of the transfer is the amount expressed in words.

(2) If the amount is expressed more than once in words, and there is a discrepancy, the sum payable is the smaller amount. The same rule applies if the amount is expressed more than once in figures only, and there is a discrepancy.

(3) If the amount is expressed in a currency having the same description as that of the State where the bank or the account from which the receiving bank is to be reimbursed is located and of at least one other State, and the specified currency is not identified as the currency of any particular State, the currency is to be considered to be the currency of the State where the reimbursing bank or the reimbursing account is located.

(4) If the account that is to be debited or credited is expressed both by the name of the account holder and by an account number and there is a discrepancy between them, the account to be debited or credited is considered to be the account as expressed by name.

Comments

1. Paragraphs (1) and (2) of prior article 3 have been consolidated into the definition of "payment order" in article 2*(i)*. Former paragraph (3) has been re-written as a rule of interpretation as suggested in the Working Group (A/CN.9/317, paras. 62 to 66). It is placed before the Working Group in two alternatives.

2. Alternative A, which consists of only one paragraph, reproduces the rule of interpretation in largely the same wording as prior article 3(3). Alternative B, in its first two paragraphs, essentially reproduces article 9(1) and (2) of the draft Convention on International Bills of Exchange and International Promissory Notes. The third paragraph is adapted from article 9(3) of the draft Convention while the fourth paragraph is new. Alternative A could be combined with the third paragraph of Alternative B, and perhaps with the fourth paragraph as well.

3. The advantage of Alternative A is that it can be applied both to paper-based payment orders and telexes that would be read visually and to electronic payment orders that would be read by computer. It does not assume whether the computer would be programmed to read the data elements in one form or the other, nor would it require re-programming of any existing computers.

4. The disadvantage of Alternative A is that, as drafted, the first portion would seem to permit a receiving bank that was in a position to read the data elements in their different representations to choose which form of representation it would wish to consider as the correct one. The last clause would preclude a bank from doing so knowingly, but it raises the question when a bank ought to know of the discrepancy. The Working Group was not in agreement as to the feasibility or desirability of assuming that the computer could and ought to be programmed to read the data elements in both words and figures and to compare them (A/CN.9/317, para. 65).

5. Although, in order to be consistent with the draft Convention, paragraph (1) of Alternative B provides that the amount of the transfer in words prevails over the amount of the transfer in figures, the rule could be reversed if it was thought appropriate, since most inter-bank payment orders are in electronic form. It might also be possible to have different rules for payment orders that must be read visually and payment orders that could be read electronically. It must be recognized that all payment orders can be reproduced so that the receiving bank could read them visually. Paragraph (2) of Alternative B could remain the same in either case.

6. Paragraph (3) of Alternative B would have the effect that, if a transfer is from an Italian bank to a Swiss Bank for 10,000 francs and the Swiss Bank is to be reimbursed by a French Bank, the transfer is to be considered to be in French francs. If the transfer is from the Italian Bank to the Swiss Bank for 10,000 francs and the Swiss Bank is to be reimbursed by debiting an account of the Italian Bank held with the Swiss Bank, the transfer is to be considered to be in Swiss francs. It would seem that the nature of reimbursement to the receiving bank is a clearer indication of the intended currency than is the location of the receiving bank or of the beneficiary's bank, which are the other two main possibilities.

Chapter II. Duties of the Parties

7. The Working Group suggested that there might be a difference between the case in which the same data element, e.g. the amount, was represented in two or more different ways and the case in which two different data elements related to the same ultimate item, e.g. name of account and number of account. The Working Group did not, however, reach agreement whether there should be a difference in result (A/CN.9/317, paras. 63-65). Paragraph (4) of Alternative B provides the basis for such a distinction.

Article 4. *Obligations of sender*

(1) A sender is bound by a payment order or by the revocation or amendment of a payment order [as] [that has been] received by the receiving bank if the sender authorized the order or is otherwise bound by it pursuant to the law of agency [or other applicable law].

(2) A purported sender is bound by an unauthorized payment order or by the revocation or amendment of a payment order if the purported sender had available a commercially reasonable procedure for authentication that would permit the receiving bank to verify that the payment order was sent by the purported sender and if the receiving bank complied with the requisite verification.

(3) A [sender] [sending bank] is obligated to adhere to any message structure prescribed by the transmission system used or agreed between the parties.

(4) A sender is obligated to reimburse the receiving bank to the extent the receiving bank has properly executed the payment order of the sender [including any fees or costs charged or incurred by the receiving bank].

Comments

1. The Working Group engaged in an extensive discussion of the basis on which a purported sender of a payment order should be bound by the order (A/CN.9/317, paras. 73-77). Paragraphs (1) and (2) of this draft attempt to reflect the general understanding of the Working Group.

2. Paragraph (1) reflects the basic position that a sender is bound by an authorized payment order once received by the receiving bank, whether or not the order was authenticated. Authorized non-authenticated payment orders are more likely if the payment order is paper-based or is in the form of a telex than if it is in the form of data transfer. The most difficult question arises in respect of improper authorizations given by a dishonest employee, former employee or other person with a relationship to a purported sender that facilitates the fraud. The prior draft attempted to set forth specific occasions when the purported sender would be bound. This approach was not accepted in the Working Group. Under one suggested approach the matter should be left to the national law of agency (A/CN.9/317, para. 75). Under another suggested approach the question should be left to the effectiveness of the authentication.

3. In effect, both suggestions are followed in this draft. The words in paragraph (1) "or is otherwise bound by it pursuant to the law of agency [or other applicable law]" should be understood to refer only to proper authorizations by agents. Unauthorized payment orders bind the purported sender under paragraph (2), which relies on the authentication used in the payment order.

4. The Working Group suggested that if the payment order had not been authorized but had been authenticated, the sender would generally be reponsible for it, but that there would be exceptions that would have to be elaborated at a later date (A/CN.9/317, para. 76). It also suggested that a standard should be established as to what would be an acceptable authentication, e.g. "commercially reasonable", that did not enter into the technical means of authenticating a payment order (A/CN.9/317, para. 47).

5. The Working Group may find it difficult to establish a standard of a commercially reasonable authentication procedure. The law governing authentication of paper-based payment orders by signature does not establish any such standard. Banks may furnish their customers with payment order forms on special paper that is difficult to alter, but those same banks may accept payment orders sent by letter as well. (See ISO 6260 for the recommended form to be used for mail payment orders between banks.)

6. Telexes may be considered to be authenticated when the number of the sending machine shown on the print-out is shown to be that of the purported sender. In addition, the name of the sending individual or organization is usually appended at the end. Questions have been raised in some countries whether this in itself is sufficient to indicate the source of a message if the purported sender denies having sent it. The use of a tested telex key would probably be required for the authentication to be a "commercially reasonable" means of verification. However, even that means of authentication is not highly secure.

7. Use of a Message Authentication Code for payment orders sent by data transfer gives a high degree of confidence in the source and content of the payment order (see ISO 8730 of 15 November 1986 and proposed revision).

8. Assuming that a commercially reasonable procedure for authentication that would permit the receiving bank to verify the source of the payment order is technically possible for the form of payment order used, there remains the question whether it is available to the sender of the particular payment order. Any system of authentication that depends on the exchange of keys to be used by the sender and the receiver can be used only between parties which have previously established relations, which does not cover the entire universe of inter-bank payment orders. Even the verification of a signature requires the prior exchange of examples of authorized signatures.

9. Since banks can expect to be both senders and receivers, it is probably the case that the authentication technique to be used for inter-bank payment orders is usually reached by true mutual consent. However, it is likely that the available authentication procedures for payment orders from the non-bank originator to the originator's bank are determined by the bank, even where the non-bank customer is a large corporation. This suggests that the originator's bank should bear the risk if the authentication techniques available are not commercially reasonable. Nevertheless, the non-bank customer may decide that between several levels of security it wishes a lower level at a commensurate lower cost. In such a case it may be that the customer should bear the risk. As a result, paragraph (2) provides that one element in deciding whether the sender would be bound by the payment order is whether "the sender had available" such a procedure.

10. The second element is that the receiving bank complied with the requisite verification. If it did so and the authentication used was correct, the receiving bank would have no reason to question whether the payment order was authorized. This aspect of the rule can be applied to all forms of electronic payment orders, whether by telex or data transfer, as well as for paper-based payment orders authenticated by a mechanical form of signature. In respect of a manual signature the equivalent rule would be that the signature was compared and that it appeared to be genuine.

11. It was suggested at the Working Group that the rule expressed in paragraph (2) would be subject to some exceptions that would be elaborated at a later time (A/CN.9/317, para. 76).

12. It was also suggested in the Working Group that the rules governing authorization and authentication of payment orders should also apply to their revocation or amendment (A/CN.9/317, para. 125).

13. Paragraph (3) is reproduced from the prior text of article 4(5). Although there was support for deleting it,

there was also the view that it served an important educational function (A/CN.9/317, para. 78). The paragraph is intended to strengthen the obligation to follow agreed to or prescribed message structures. (Compare the definition of "payment order" in article 2*(i)* and its comment 14.) If the word "sender" is used, it would include non-bank originators. The last clause that was in square brackets relating to liability has been deleted.

14. Article 4(6) of the prior draft, which set forth an obligation of the sender to assure adequate cover before the value date, has been deleted as unnecessary. Under article 5 a receiving bank is not obligated to execute a payment order. One reason it may decide not to do so is that cover is not yet in place and notified to the receiving bank. Nevertheless, it may be noted that in the Working Group it was suggested that a sending bank's duty should be to have cover in place in sufficient time so that there could be notification by the execution date, which is often the value date (A/CN.9/317, para. 79).

15. Paragraph (4) reproduces article 4(7) of the prior draft without material change. Paragraph (4) has two elements: the sender must reimburse the receiving bank once the bank has acted and the sender must reimburse the receiving bank only to the extent the receiving bank has properly executed the payment order of the sender. The payment order of the sender is, according to paragraph (1), the payment "[as] [that has been] received by the receiving bank". It was suggested in the Working Group that later consideration would have to be given to whether such a rule should apply where the transmission system had been chosen by the receiving bank (A/CN.9/317, para. 72).

16. The words "to the extent" in paragraph (4) may be seen in terms of the monetary amount to be reimbursed. If the sender's order is for 1,000 units and the receiving bank sends a new order for 10,000 units by mistake, or sends two orders for 1,000 units each, the sender needs to reimburse only 1,000 units. If the receiving bank sends a new order for 100 units, the sender needs to reimburse for 100 units. Only when the receiving bank corrects its error by amending its payment order to 1,000 units or by sending a second payment order for 900 units would the sender be obligated to reimburse for the entire 1,000 units.

17. The words "to the extent" also limit the duty to reimburse if the receiving bank sends a new order to an incorrect subsequent bank and that error is never corrected so that the original order is not carried out.

18. The costs charged by the receiving bank relate to its charges for its services to the sender. The costs incurred by the receiving bank are the costs charged to it by the subsequent receiving bank. Except for the costs charged by the beneficiary's bank, those costs should cascade back to the originator, unless the beneficiary has agreed with the originator to pay them. For the case in which those costs are deducted from the amount of the funds being transferred, see article 11(3).

Article 5. *Obligations of receiving bank*

(1) A receiving bank that receives a payment order from a sender with which there was a prior relationship is obligated within the time required by article 7 either to accept the order or to notify the sender that it will not do so, unless the reason for failing to accept the payment order was that the sender did not have sufficient funds with the receiving bank to reimburse it or that the receiving bank was precluded by an inter-bank agreement from executing the payment order. If within the required time a receiving bank does not give notice that it will not act on a payment order, it may no longer give such notice and is bound to execute the order.

(2) A receiving bank that accepts a payment order is obligated to execute it in a proper manner in accordance with the instructions.

(3) A receiving bank that is not the beneficiary's bank properly executes a payment order if:

(a) another bank accepts a payment order from the receiving bank that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner, and

(b) the other bank is the beneficiary's bank or an appropriate intermediary bank, and

(c) (i) the receiving bank is the originating bank and the funds transfer is completed within the time required by article 7, or

(ii) the receiving bank is an intermediary bank, and the other bank accepts the payment order within the time required by article 7.

(4) A receiving bank that is the beneficiary's bank properly executes a payment order

(a) if the beneficiary maintains an account at the beneficiary's bank into which funds are normally credited, by, in the manner and within the time prescribed by law, including article 7, or by agreement between the beneficiary and the bank;

(i) crediting the account,

(ii) placing the funds at the disposal of the beneficiary, and

(iii) notifying the beneficiary; or

(b) if the beneficiary does not maintain an account at the beneficiary's bank, by

(a) making payment by the means specified in the order or by any commercially reasonable means; or

(b) giving notice to the beneficiary that the bank is holding the funds for the benefit of the beneficiary.

(5) The receiving bank is not bound to follow an instruction of the sender specifying an intermediary bank, funds transfer system or means of transmission to be used in carrying out the funds transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would cause excessive delay in completion of the funds transfer. The receiving bank acts within the time required by article 7 if it, in good faith and in the time required by that article, enquires of the sender as to the further actions it should take in light of circumstances.

Comments

1. The obligations of a receiving bank to act on a payment order as set out in paragraph (1) have been reduced from those in prior article 5 in three ways:

(a) A receiving bank is required to give notice of any failure to accept the payment order only if it has had a prior relationship with the sender. That prior relationship may be contractual or may arise out of a course of dealing (A/CN.9/317, para. 81).

(b) Even if there was a prior relationship, the receiving bank is not required to give notice of its failure to accept the payment order if the sender did not have sufficient funds with the receiving bank to reimburse it. A sender should be considered to be under a duty to know the balance of its account at all times. In any case, when the sender does not have sufficient funds with the receiving bank, including that notification has not arrived of receipt of cover by a correspondent bank, both sender and receiving bank would normally prefer to wait for the receipt of funds rather than to reject the payment order (A/CN.9/317, para. 82, but see para. 79).

(c) Even if there is a prior relationship, the receiving bank is not required to give notice of its failure to accept the payment order if it was precluded from executing it by an inter-bank agreement. The example given in the seventeenth session of the Working Group was the rules adopted in the United States requiring limits to be established by each bank for the net credit exposure it would extend as a receiving bank to each other bank with which it dealt and net debit caps limiting the total by which a bank could commit itself as a sending bank in excess of the amount committed by other banks to it (A/CN.9/317, para. 91). These two limits (bilateral credit limits and net debit caps) are currently applied in the United States only to the two high-value on-line funds transfer systems, CHIPS and FEDWIRE.

2. The first two changes in paragraph (1) can apply to the failure of the originator's bank to execute a payment order received from the originator. These situations fit well within the policies suggested in the Working Group.

3. All three changes in paragraph (1) can also apply to the failure of an intermediary bank or of the beneficiary's bank to execute a payment order received from a sending bank. The third change can apply only to interbank relations. However, the credit transfer that is delayed or not carried out at all, without notice by the receiving bank to the sending bank, is the transfer from the originator to the beneficiary. The Working Group may wish to consider the effect of these changes on the expectations of originators that their payment orders will be carried to completion within a predictable period of time. The Working Group may also wish to consider the effect of such rules on the proper allocation of responsibility when a payment order is not executed within the appropriate period of time.

4. Paragraph (2), which states the obligations of a receiving bank that has accepted a payment order, is based upon prior article 11(3). What constitutes acceptance of a payment order is set forth in article 6. Contrary to the prior provision, but similar to paragraph (1), paragraph (2) applies to all receiving banks, including the beneficiary's bank (A/CN.9/317, para. 140).

5. Paragraph (3) covers the subject matter of prior article 6. That text made provision for different forms in which the originator's bank or an intermediary bank might have received or forwarded payment orders. At the suggestion of the Working Group, these different situations have been combined into one generally worded provision (A/CN.9/317, para. 86). The three subparagraphs contain the three elements of the bank's duty.

6. Subparagraph (3)*(a)* relates to the content of the payment order. In essence it includes prior article 6(1)*(b)* and the second sentence of (2). The content of the payment order is that as received by the receiving bank, thereby making the sender responsible for errors in transmission. This rule is contained in article 4(1). Nevertheless, subparagraph (3)*(a)* of this article applies only to sending banks (see comment 15 to article 4 and A/CN.9/317, para. 72).

7. Subparagraph (3)*(c)* distinguishes between the responsibility of an originator's bank for performance of the entire funds transfer within the required time and the responsibility of an intermediary bank for performance of the individual link within the required time. The required periods of time are set forth in article 7. Compare the duties of an intermediary bank in prior articles 6(1), 8 and 11(1) and comment by Working Group in A/CN.9/317, paras. 101-104.

8. The duty of the intermediary bank could be stated to be only to send an appropriate payment order within a required period of time. In such a case delays in communication or arising out of the delay or failure of the receiving bank to accept the payment order would be at the risk of the originator's bank. The duty could be stated to be fulfilled when a proper payment order is received by the receiving bank. Subparagraph (3)*(c)*(ii) goes somewhat further in providing that a sending bank is responsible for the acceptance of the payment order by its receiving bank. This flows from the assumption that delays or refusals by a receiving bank to accept a payment order will normally be the result of an error on the part of the sending bank or of its failure to have adequate cover in place.

9. Paragraph (4) contains the substance of prior article 7. Although it was suggested in the Working Group that the Model Rules should not deal with the manner of execution of a payment order by a beneficiary's bank, and that it would be more appropriate to leave the matter to bank practice and to the contracts between banks and customers, the Working Group decided to retain the substance of prior article 7 since its solutions were relevant to provisions on the discharge of the underlying obligation (A/CN.9/317, para. 90).

10. The substance of prior article 7 has been retained with the following changes:

(a) A beneficiary's bank is obligated under this article only if it has accepted the payment order under article 6.

(b) While the article sets forth the type of actions to be taken, it sets out neither the manner in which they are to be accomplished nor the time when they are to be accomplished. Those two elements are left to other rules of law or to agreement between the beneficiary and the bank, with the single exception that reference is made to certain provisions in article 7 as to when the beneficiary's bank must act.

11. Paragraph (4) explicitly recognizes that it is unlikely that rules of law could be drafted on a worldwide level specifying how and when the beneficiary's bank should take the various actions necessary for the beneficiary to have useful access to the funds arising out of a funds transfer. Such recognition supports the rule in article 11(2) that an obligation is discharged when the beneficiary's bank accepts the payment order. Nevertheless, article 9(4)*(b)* states a liability of the beneficiary's bank to its sender and to the originator for failure to place funds at the disposal of the beneficiary in accordance with a pay date or execution date.

12. Paragraph (5) reproduces prior article 6(3) without change.

Article 6. *Acceptance of a payment order*

(1) A payment order is accepted by a receiving bank that is not the beneficiary's bank at the earliest of the following times:

(a) when the bank sends a payment order intended to carry out the payment order received;

(b) when the bank receives both the payment order and notice that cover is available, provided that there was a prior relationship with the sender.

(2) The beneficiary's bank accepts a payment order at the earliest of the following times:

(a) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders received from the sender without notification that cover is in place [or a course of action to that effect has been established between them];

(b) when the bank receives both the payment order and notice that cover is available;

Variant A

(c) when the bank credits the beneficiary's account [without reserving a right to reverse the credit if cover is not furnished] or otherwise pays the beneficiary;

Variant B

(c) when the bank gives the beneficiary the [unconditional] right to withdraw the credit or the fund [, whether or not a fee or payment in the nature of interest must be paid for doing so];

Variant C

(c) when the bank gives notice to the beneficiary that it has the right to withdraw the credit or the funds;

(d) when the bank otherwise applies the credit as instructed in the payment order;

(e) when the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court.

Comments

1. Under article 5 of the prior draft a receiving bank was always bound to act on a payment order it had received either by executing it or by giving notice within the time required by prior article 8 (currently article 7). If it did not act within the required time, it could not later give notice that it would not execute the order. In that context it did not seem necessary to define the time when the receiving bank became obligated under the payment order.

2. Since article 5 was modified at the suggestion of the Working Group so that a receiving bank is not always under an obligation to act on a payment order or to do so within a required time, it is necessary to determine when its obligations under the payment order arise. In this draft those obligations arise when a receiving bank "accepts" the payment order. After a receiving bank has accepted a payment order, it can no longer reject it. Furthermore, the time of acceptance by a second receiving bank serves to determine under article 5 when a first receiving bank has completed its obligations to execute it.

3. The time of acceptance should be the earliest point of time when an objective act has occurred that permits one to say that the receiving bank should no longer be permitted to reject the order. In the case of a receiving bank that is not the beneficiary's bank, that objective act will often be that the receiving bank sends its own payment order with the intention of carrying out the order received. It is of no relevance in this context whether the order sent is for the correct amount, contains the correct instructions or is sent to the correct addressee; it is the intention to carry out the instruction that is relevant.

4. Under subparagraph (1)*(b)* the objective act is the receipt of notice of cover from a sender with which there is a prior relationship. In many cases reimbursement will involve debiting an account of the sender with the receiving bank, in which case notice is automatic. In other cases reimbursement will consist of receiving notice of credit in an account the bank holds with the sender or in a correspondent bank.

5. Devising an appropriate rule in respect of the beneficiary's bank is more complex. It is clear that the beneficiary's bank must have the right to reject a payment order, at least under some circumstances. As regards any conscious decision whether to accept a given payment order, a class of payment orders or payment orders from a particular sending bank, a bank probably does not act any differently whether it is an intermediary bank or a beneficiary's bank. However, the beneficiary's bank has a unique role in the credit transfer. It owes duties to the beneficiary to receive credit transfers for the beneficiary's credit. It is a necessary link in the credit transfer chain permitting value to be transmitted from the originator to the beneficiary, whether that credit transfer is for the purpose of discharging an obligation, purchasing securities or simply shifting funds from one account to another when

the originator and the beneficiary are the same person. Therefore, while the beneficiary's bank may have the right to reject the payment order, that right of rejection should be limited either as to the reasons for which it can be rejected or the time within which it can be rejected or both.

6. This draft of paragraph (2) has the effect of limiting the time within which the payment order can be rejected. It is based upon prior article 9(3), which dealt with the time after which a payment order could no longer be revoked or amended. The Working Group was in agreement at its seventeenth session that the subject was complex and that the Working Group would have to gain a better understanding of the banking practices and of the legal conceptions in different countries before it would be prepared to make policy choices in this regard (A/CN.9/317, para. 129).

Article 7. *Time to accept and execute payment order or give notice*

(1) A receiving bank that is obligated under article 5 to accept a payment order or to give notice that it will not do so must accept and execute the payment order or give the required notice within the time consistent with the terms of the order, in particular, as follows:

(a) When a payment order states an execution date, the receiving bank is obligated to execute the order on that date. When the payment order states a value date but no execution date, the execution date shall be deemed to be the value date. Unless otherwise agreed, the receiving bank may not charge the sender's account prior to the execution date.

(b) When no execution, value or pay date is stated on a payment order, the execution date of that order shall be deemed to be the date the order is received, unless the nature of the order indicates that a different execution date is appropriate.

(c) When a pay date is stated on the payment order accepted by the originator's bank, the obligation of the originator's bank is that the beneficiary's bank accept the payment order by that date. An intermediary bank that accepts a payment order with a pay date is obligated to use its best efforts to cause the beneficiary's bank to accept the payment order by that date. A beneficiary's bank that accepts a payment order on or before the pay date is obligated to place the funds at the disposal of the beneficiary on that date.

(d) When no pay date is stated on the payment order accepted by the originator's bank, the obligation of the bank is that the beneficiary's bank accept a payment order within an ordinary period of time for that type of order.

(2) A receiving bank that receives a payment order too late to execute it in conformity with the provisions of paragraph (1) nevertheless complies with those provisions if it executes the order on the day received regardless of any execution, value or pay date specified in the order.

(3) A receiving bank that receives a payment order after the receiving bank's cut-off time for that type of payment order is entitled to treat the order as having been received on the following day the bank executes that type of payment order.

(4) A notice that a payment order will not be accepted must be given on the day the decision is made, but no later than the day the receiving bank was required to execute the order.

(5) If a receiving bank is required to take an action on a day when it is not open for the execution of payment orders of the type in question, it must take the required action on the following day it executes that type of payment order.

Comments

1. As suggested by the Working Group, the article has been restructured. Prior paragraphs (2), (3) and (4) of article 8, are now set forth as subparagraphs of paragraph (1). The order of prior paragraphs (2) and (3) has also been changed to conform to the re-drafting (see, A/CN.9/317, para. 98 and 99). Since the definition of a bank in article 2*(e)* considers a branch to be a separate bank, these time limits apply to each branch (A/CN.9/317, para. 97).

2. In contrast to former article 8(2), paragraph (1)*(c)* on the obligations arising out of acceptance of a payment order that contains a pay date separates the obligations of a receiving bank that is not the beneficiary's bank into the obligations of the originator's bank and those of an intermediary bank, as suggested in the Working Group (A/CN.9/317, paras. 101 to 104). Consistent with the provisions of article 9(2), the originator's bank is responsible for the timely execution of a funds transfer when the payment order it received contains a pay date. Timely execution as far as the originator's bank is concerned is that the beneficiary's bank accepts the payment order by that date. An intermediary bank has an obligation only of using its best efforts. The obligation of the beneficiary's bank to make the funds available to the beneficiary by that date is also set forth in article 7(1)*(c)*.

3. Subparagraph (1)*(d)* places an obligation on the originator's bank for the timely completion of the credit transfer when no special instructions have been given to it by the originator by means of an execution or pay date. No standard is provided for determining what is an ordinary period of time, but it could be expected that in many situations an ordinary period of time would be determinable with reasonable objectivity. Intermediary and beneficiary's banks would bear the consequences only of their own actions.

Article 8. *Revocation and amendment of payment order*

(1) A revocation or amendment of a payment order issued to a receiving bank that is not the beneficiary's bank is effective if it is received in sufficient time for the receiving bank to act on it before the receiving bank has re-transmitted the order.

(2) A sender may require a receiving bank that is not the beneficiary's bank to revoke or amend the payment order the receiving bank has re-transmitted. A sender may also

require a receiving bank to instruct the subsequent bank to which it re-transmitted the order to revoke or amend any order that the subsequent bank may in turn have re-transmitted.

(3) A revocation or amendment of a payment order issued to the beneficiary's bank is effective if it is received in time for the bank to act on it before the bank has accepted the order.

(4) A sender may revoke or amend a payment order after the time specified in paragraph (1) or (3) only if the receiving bank agrees.

(5) A sender who has effectively revoked a payment order is not obligated to reimburse the receiving bank [except for costs and fees] and, if the sender has already reimbursed the receiving bank for any part of the payment order, it is entitled to recover from the receiving bank the amount paid.

(6) Neither the death nor incapacity of either the sender or the originator affects the continuing legal validity of a payment order.

(7) The beneficiary's bank may reverse the credit entered to the beneficiary's account to the extent that the credit was in excess of the amount in the originator's payment order, was the result of a duplicate credit arising out of the same payment order by the originator or was entered to an account other than the account specified by the originator.

[(8) A bank has no obligation to release the funds received if ordered by a competent court not to do so [because of fraud or mistake in the funds transfer.]]

Comments

1. Paragraphs (1) and (2) reproduce prior article 9(1) and (2) except for editing changes (A/CN.9/317, para. 121).

2. The substance of paragraph (3) remains unchanged. However, under the current draft the limit on the time when a payment order can be revoked or amended in the hands of the beneficiary bank is when that bank has "accepted" it. The content of prior article 9(3) is now to be found in article 6(2) on when a beneficiary's bank accepts a payment order.

3. The credit transfer comes to an end when the beneficiary's bank accepts a payment order, even though there may be additional acts to be performed as a result of the credit transfer. As a result it is the appropriate time for the sender's right to revoke or amend a payment order, whether on its own initiative or on that of a prior sender, to come to an end. However, in respect of other banks, the payment order should be revocable under paragraph (1) so long as it has not been re-transmitted, even though it may have been accepted at an earlier time. This is consistent with the policy of paragraph (2).

4. Paragraph (6) has been redrafted in conformity with the suggestion of the Working Group (A/CN.9/317, para. 132). The Working Group agreed that, although legal incapacity was of particular relevance to bankruptcy, there should be no attempt at this time to deal with that problem.

5. Paragraph (7) has been added at the request of the Working Group (A/CN.9/317, paras. 68 and 130). If the credit to the beneficiary's account is not in accord with the originator's payment order, one of the banks in the credit transfer chain has made an error or there has been fraud. Paragraphs (1) to (4) on revocation or amendment of the payment order are relevant if the error was made by a bank prior to the beneficiary's bank and was found prior to acceptance of the payment order by the beneficiary's bank. Paragraph 7 is relevant if the error was made by the beneficiary's bank or, if made by a prior bank, was found too late to revoke or amend the payment order prior to acceptance by the beneficiary's bank.

6. Paragraph (7) permits the beneficiary's bank to reverse the credit it has entered to the beneficiary's account and, as such, goes beyond a provision that would give the beneficiary's bank a right of recovery that might have to be exercised in judicial proceedings if the beneficiary was not willing to allow the debit to be made to the account.

7. The Working Group decided to place paragraph (8) in square brackets pending a decision by the Commission whether it would undertake consideration of the problem in the context of stand-by letters of credit and contract guarantees.

Chapter III. Liability

Article 9. *Liability of receiving bank*

(1) A receiving bank that fails in its obligations under article 5 is liable therefore to its sender and to the originator.

(2) The originator's bank and each intermediary bank that accepts a payment order is liable to its sender and to the originator for the losses as set out in paragraph (5) of this article caused by the non-execution or the improper execution of the credit transfer as instructed in the originator's payment order. The credit transfer is properly executed if a payment order consistent with the payment order issued by the originator is accepted by the beneficiary's bank within the time required by article 7.

(3) An intermediary bank is not liable under paragraph (2) if the payment order received by the beneficiary's bank was consistent with the payment order received by the intermediary bank and it executed the payment order received by it within the time required by article 7.

(4) The beneficiary's bank is liable

(a) to the beneficiary for its improper execution or its failure to execute a payment order it has accepted to the extent provided by the law governing the [account

relationship] [relationship between the beneficiary and the bank], and

(b) to its sender and to the originator for any losses caused by the bank's failure to place the funds at the disposal of the beneficiary in accordance with the terms of a pay date; execution date or value date stated in the order, as provided in article 7.

(5) If a bank is liable under this article to the originator or to its sender, it is obliged to compensate for

(a) loss of interest,

(b) loss caused by a change in exchange rates,

(c) expenses incurred for a new payment order and for reasonable costs of legal representation,

(d) any other loss that may have occurred as a result, if the improper [or late] execution or failure to execute resulted from an act or omission of the bank done with the intent to cause such improper [or late] execution or failure to execute, or recklessly and with knowledge that such improper [or late] execution or failure to execute would probably result.

(6) Banks may vary the provisions of this article by agreement to the extent that it increases or reduces the liability of the receiving bank to another bank and to the extent that the act or omission would not be described by paragraph (5)*(d)*. A bank may agree to increase its liability to an originator that is not a bank but may not reduce its liability to such an originator.

(7) The remedies provided in this article do not depend upon the existence of a pre-existing relationship between the parties, whether contractual or otherwise. These remedies shall be exclusive and no other remedy arising out of other doctrines of law shall be available.

Comments

1. Article 9 has been substantially modified from the prior article 12 in both substance and presentation by combining in one article the content of former articles 11, 12, 13 and 14. The prior draft distinguished between the parties to whom a receiving bank was responsible (articles 11 and 13) and the amount of the liability (articles 12 and 14).

2. Paragraph (1) sets forth the liability of a receiving bank for its own failure to accept a payment order or give notice that it would not do so, if the bank was obligated to accept or give notice under article 5.

3. The basic rule of paragraph (2) is that the originator's bank is liable to the originator for the proper execution of the credit transfer. The question was raised in the Working Group whether the originator should also have the right to hold each intermediary bank liable (A/CN.9/317, para. 139). However, such a rule has been maintained for those cases in which the originator may not be able to recover from his bank the losses he has suffered.

4. Paragraph (2) also provides for an obligation of each intermediary bank to its sender for the proper execution of the credit transfer. This aspect of the rule, based upon prior article 11(3), permits the liability to be passed through the chain of banks until it reaches the bank where the error occurred.

5. The second sentence of paragraph (2) is based on former article 11(2). By placing it in the same paragraph as the first sentence, its purpose may now be clearer than in the prior draft (see A/CN.9/317, paras. 144 and 145).

6. Paragraph (3) is based on the second sentence of prior article 11(1).

7. Paragraph (4) is based on prior articles 13 and 14. Although subparagraph *(a)* may be thought to fall outside the scope of application of the Model Rules, the Working Group decided to defer any decision to delete it until a later time (A/CN.9/317, para. 150).

8. Paragraph (4)*(b)* must be considered in the context of the rule on finality of the credit transfer and the rule on discharge of obligations contained in article 11. If the rule continues that the credit transfer is final when the beneficiary's bank accepts the payment order and any underlying obligation is discharged at or before that time, the originator and the sender to the beneficiary's bank will seldom have any reason to complain if the beneficiary's bank credits the wrong account or credits the beneficiary's account late. However, it may be important to the originator that the funds are at the disposal of the beneficiary by a certain date or even by a certain time of day. Therefore, if the beneficiary's bank accepts a payment order with a pay date, execution date or value date, it should be liable to the originator for its failure to make the funds available by that date.

9. As suggested in the Working Group, paragraph (5)*(d)* is based on the wording found in article 8 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules).

10. A new paragraph (6) has been added describing the extent to which the provisions of this article can be varied by agreement. In essence, it provides that between themselves banks can vary the liability of the receiving bank in either direction, but that as to an originator that is not a bank, the liability can only be increased not decreased.

11. Paragraph (7), making the liability provisions of this article not dependent on a contractual relationship and making them exclusive, was added at the suggestion of the Working Group (A/CN.9/317, para. 119).

Article 10. *Exemption from liability*

A receiving bank and any bank to which the receiving bank is directly or indirectly liable under article 9 is exempt from liability for a failure to perform any of its obligations if the bank proves that the failure was due to the order of a court or to interruption of communication facilities or equipment failure, suspension of payments by another bank, war, emergency conditions or other circumstances that the bank could not reasonably be expected to

have taken into account at the time of the funds transfer or if the bank proves that it could not reasonably have avoided the event or overcome it or its consequences.

Comment

1. As suggested by the Working Group article 15 has been re-drafted to contain the standard of liability set forth in Variant A of prior article 15 with the examples from Variant B pertinent to funds transfers (A/CN.9/317, para. 155).

2. The Working Group was of the view that it was appropriate to impose on banks a higher standard of performance in view of the decision to restrict severely any reference in article 12 to indirect loss (A/CN.9/317, para. 156).

Chapter IV. Civil Consequences of Funds Transfer

Article 11. *Payment and discharge of monetary obligations; obligation of bank to account holder*

(1) Unless otherwise agreed by the parties, payment of a monetary obligation may be made by a credit transfer to an account of the beneficiary in a bank.

(2) The obligation of the debtor is discharged and the beneficiary's bank is indebted to the beneficiary to the extent of the payment order received by the beneficiary's bank when the payment order is accepted by the beneficiary's bank.

(3) If one or more intermediary banks have deducted charges from the amount of the credit transfer, the obligation is discharged by the amount of those charges in addition to the amount of the payment order as received by the beneficiary's bank. Unless otherwise agreed, the debtor is bound to compensate the creditor for the amount of those charges.

(4) To the extent that a receiving bank has a right of reimbursement from a sender by debit to an account held by the receiving bank for the sender, the account shall be deemed to be debited when the receiving bank accepts the payment order.

Comments

1. This article contains a number of important provisions that are associated with the credit transfer, though they do not have to do with the credit transfer itself. In many countries such provisions would not be included in a law governing funds transfers, while in others they would be included. They are included in this draft because it is important to keep them in mind even if it is decided at a later time to exclude some or all of this article from the final text of the Model Rules.

2. Paragraph (1) deals with the important rule that monetary obligations can be discharged by interbank credit transfers leading to credit to an account. While this general proposition is widely recognized today, remnants of the objections arising out of legal tender legislation still arise on occasion. Furthermore, in some countries it is not clear that any person other than the account holder has the right to deposit funds to an account. As a result the Working Group agreed that it would be appropriate to include such a rule (A/CN.9/317, para. 158).

3. The Working Group agreed that paragraph (1) should be restricted to providing that an obligation could be discharged by a transfer without considering to what account the debtor-originator might have the funds sent (A/CN.9/317, para. 159).

4. Paragraph (2) provides that the obligation of the debtor is discharged when the beneficiary's bank accepts the payment order. While this is a substantial change in wording from prior article 16(3), it is not a change in substance since the time of acceptance under article 7 is essentially the same as the times specified by prior article 16(3).

5. In the Working Group it was pointed out that in some countries an obligation was considered to be discharged when the originator's bank received the payment order with cover from the debtor-originator. Since such rules were considerably earlier than the rule in paragraph (2) and other countries might have rules on discharge that would be later than the rule in paragraph (2), the Working Group decided to consider at a future session what effect such national laws on discharge of the underlying obligation should have on the appropriate rules on finality of the credit transfer, keeping in mind its position that the rules on discharge, whether under the Model Rules or under national law, and the rules governing finality should be consistent (A/CN.9/317, paras. 160-162).

6. Paragraph (3) is concerned with a difficult problem when credit transfers pass through several banks. The originator is responsible for all charges up to the beneficiary's bank. So long as those charges are passed back to the originator, there are no difficulties. When this is not easily done, a bank may deduct its charges from the amount of the funds transferred. Since it may be impossible for an originator to know whether such charges will be deducted or how much they may be, especially in an international credit transfer, it cannot provide for this eventuality. Therefore, paragraph (4) provides that the obligation is discharged by the amount of the charges that have been deducted as well as by the amount received by the beneficiary's bank; the originator would not be in breach of contract for late or inadequate payment. Nevertheless, unless the beneficiary agrees to pay these charges, which often occurs, the originator would be obligated to reimburse the beneficiary for them.

7. Paragraph (4) is the corollary to paragraph (2) in that it gives the rule as to when the account of a sender, including but not limited to the originator, is to be considered debited, and the amount owed by the bank to the sender reduced or the amount owed by the sender to the bank increased. That point of time is when the receiving bank accepts the payment order. It may be before or after the bookkeeping operation of debiting the account is

accomplished. Paragraph (4) may have its most important application in determining whether credit is still available in the account holder's account against which there might be legal process. In the usual situation for a receiving bank that is not the beneficiary's bank, that point of time is when it executes the payment order by sending a new payment order to the next bank.

Chapter V. Conflict of Laws

Article 12. *Conflict of laws*

(1) Persons who anticipate that they will send and receive payment orders may agree that the law of the State of the sender, of the receiver or of the State in whose currency the payment orders are denominated will govern their mutual rights and obligations arising out of the payment orders. In the absence of agreement, the law of the State of the receiving bank will govern the rights and obligations arising out of the payment order.

(2) In the absence of agreement to the contrary, the law of the State where an obligation is to be discharged governs the mutual rights and obligations of an originator and beneficiary of a credit transfer. If between the parties an obligation could be discharged by credit transfer to an account in any of one or more States or if the transfer was not for the purpose of discharging an obligation, the law of the State where the beneficiary's bank is located governs the mutual rights and obligations of the originator and the beneficiary.

Comments

1. The Working Group requested the secretariat to prepare a draft provision on conflict of laws (A/CN.9/317, para. 165).

2. Paragraph (1) governs the conflict of laws in regard to the segments of a credit transfer. Paragraph (2) governs the conflict of laws in regard to the credit transfer itself between the originator and the beneficiary. Both provisions recognize the right of the parties to choose the applicable law.